

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**JULY 30, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0029

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**KRIST OIL CO., INC.**

**Plaintiff-Appellant,**

**v.**

**CITY OF ASHLAND,**

**Defendant-Respondent**

APPEAL from a judgment of the circuit court for Ashland County:  
ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Krist Oil Co., Inc., appeals a judgment that upheld the City of Ashland's denial of an application for a license to sell packaged alcoholic beverages. Krist makes the following claims: (1) Ashland's ordinance is unconstitutional; (2) Ashland's violation of § 125.12(2)(d) and (3m), STATS., denies Krist its statutory rights and due process and equal protection of the law; and (3) Ashland and its mayor's illegal and unconstitutional activities raise issues of fact precluding summary judgment. We affirm the summary judgment.

Krist owns and operates the Ashland Citgo Quik Food Mart, a convenience/grocery store. Krist applied for a license to sell packaged alcoholic beverages. Included in its application was its request to change the ordinance, which reads in part as follows: "No retail class 'A' or 'B' intoxicating liquor license or fermented malt beverage license shall be issued for any premises which sells gasoline ...."

At the outset of the government and community affairs committee meeting at the Ashland city hall, one committee member moved to deny Krist's requests without a hearing. After Krist objected and was given an opportunity to be heard, its application was denied. Krist appealed to the city council, and the matter was set for the March 9, 1993, city council meeting.

Ashland sent the notice of the meeting to the Ashland Citgo convenience store, but not to Krist's attorney and manager as requested. As a result, Krist did not attend the city council meeting. The license application and ordinance change request were denied.

On March 11, the City sent Krist a letter apologizing for the erroneous mailing. The letter advised that Krist could appear at the April 13 council meeting and ask the City to reconsider the matter. The letter also advised that each councilor had either attended the committee meeting or read the minutes, and were aware of Krist's arguments. They felt strongly about maintaining the current ordinance provisions and did not feel any presentation Krist could make would change their opinions.

Krist filed a complaint in circuit court challenging the constitutionality of the ordinance. It alleged that Ashland failed to provide any form of written denial, contrary to § 125.12(3m), STATS. Krist also alleged that Ashland had no basis for denying the license, did not have a full quota, and acted arbitrarily.<sup>1</sup> Krist alleged that Ashland's mayor made unfair and derogatory accusations against Krist. The mayor allegedly said that Krist was no good and was "Italian Mafia[]"; that Ashland did not need another convenience store and was going to run Krist out of town; that it wrongfully sold gas and merchandise below cost and that Krist would never get a liquor license in Ashland.

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<sup>1</sup> Krist does not dispute that it sells gasoline.

The trial court upheld the constitutionality of the ordinance and granted Ashland a summary judgment of dismissal. The court concluded that the ordinance's limitations were rationally related to the purpose of deterring people from the operation of motor vehicles while intoxicated. Krist appeals the summary judgment of dismissal.

When reviewing summary judgment, we apply the standards set forth in § 802.08(2), STATS., in the same manner as the circuit court. *Kreinze v. NDII Secs. Corp.*, 138 Wis.2d 204, 209, 406 N.W.2d 164, 166 (Ct. App. 1987). "The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Section 802.08(2), STATS.

We first address Krist's equal protection challenge to the constitutionality of the Ashland ordinance. The constitutionality of an ordinance is a question of law this court reviews without deference to the trial court. *City of Milwaukee v. Nelson*, 149 Wis.2d 434, 446, 439 N.W.2d 562, 566 (1989). "We are to indulge in every presumption possible to sustain an ordinance, and will search for any reasonable basis for its enactment." *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 105 Wis.2d 203, 217-18, 313 N.W.2d 805, 813 (1982) (quoting *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee*, 102 Wis.2d 208, 217, 306 N.W.2d 255, 258-59 (Ct. App. 1981)).

"Where neither an invidious classification nor a deprivation of a fundamental interest is alleged, the equal protection clause requires only that the classification bear some rational relationship to legitimate governmental ends." *Brown v. Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990). Here, Krist does not allege any classification that traditionally receives some heightened level of scrutiny. *Cf. id.* (such as race, alienage, national origin or gender). Also, it has been held that "a liquor license does not rise to the level of a fundamental right ...." *Id.* "Additionally, we note that, while some bias or conflict of interest may have shaped this legislation, the motives of legislators are irrelevant to rational basis scrutiny. Instead, we must accept any justification the legislature offers for its action." *Id.* It is the court's obligation to locate or construct, if possible, a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. *Rubin v. City of Wauwatosa*, 116 Wis.2d 305, 319, 342 N.W.2d 451, 457 (Ct. App. 1983).

Therefore, when confronted with an equal protection challenge, we inquire only "whether the ordinance is rationally related to the public health, safety, morals, or general welfare." *State ex rel. Grand Bazaar*, 105 Wis.2d at 211, 313 N.W.2d at 810. We first examine whether the ends sought by the legislation are legitimate. Here, the City has a legitimate interest in limiting the availability of alcohol to drivers. Because the ends are legitimate, we turn to the rationality of the means. Ashland's ordinance prohibits the sale of intoxicants and gasoline on the same premises. Ashland's attempt to address its concerns about the correlation between access to alcohol and drinking and driving, by prohibiting the access to alcohol at establishments that also sell gasoline, is rationally based. Because the classification is reasonably related to a legitimate purpose, the ordinance does not deny equal protection.

Next, Krist argues that its rights under § 125.12(2)(d) and (3m), STATS., was violated.<sup>2</sup> Krist argues that § 125.12(3m) entitles it to a written

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<sup>2</sup> Section 125.12(2)(d), STATS., provides:

Judicial review. The action of any municipal governing body in granting or failing to grant, suspending or revoking any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, may be reviewed by the circuit court for the county in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality. The procedure on review shall be the same as in civil actions instituted in the circuit court. The person desiring review shall file pleadings, which shall be served on the municipal governing body in the manner provided in ch. 801 for service in civil actions and a copy of the pleadings shall be served on the applicant or licensee. The municipal governing body, applicant or licensee shall have 20 days to file an answer to the complaint. Following filing of the answer, the matter shall be deemed at issue and hearing may be had within 5 days, upon due notice served upon the opposing party. The hearing shall be before the court without a jury. Subpoenas for witnesses may be issued and their attendance compelled. The decision of the court shall be filed within 10 days after the hearing and a copy of the decision shall be transmitted to each of the parties. The decision shall be binding unless it is appealed to the court of appeals.

Section 125.12(3m) provides:

Refusals by local authorities to issue licenses. If a municipal governing body or

denial and reasons for the denial from the City of Ashland. Krist fails to explain why the March 11, 1993, letter does not comply with § 125.12(3m). It fails to show that it requested a written denial from Ashland. It fails to identify how it was prejudiced by lack of a written denial. Failure to show prejudice precludes appellate relief. *See* § 805.18(1), STATS.

Krist also argues that § 125.12(2)(d), STATS., entitles it to an evidentiary hearing on critical factual issues in dispute. Krist does not, however, identify the disputed factual issues or provide record citations by which the court could locate in the record the proofs in support of the factual issues. *See* § 809.19(1)(e), STATS. This court declines to address argument unsupported by appropriate record reference. *See Keplin v. Hardware Mut. Cas. Co.*, 24 Wis.2d 319, 324, 129 N.W.2d 321, 323 (1964). Because "the Court of Appeals is a fast-paced, high-volume court [t]here are limits beyond which we cannot go in overlooking these kinds of failings. ... [F]or us to decide [the] issues, we would first have to develop them. We cannot serve as both advocate and judge." *State v. Pettit*, 171 Wis.2d 627, 647, 492 N.W.2d 633, 642 (Ct. App. 1992).

Krist also argues that violations of § 125.12, STATS., deny him due process and equal protection. In a one-paragraph argument, Krist states that the committee was willing to deny his request without a hearing and that his arguments fell on deaf ears; that the City kept him from appearing before the council; that the March 11, 1993, letter was a coverup for lack of notice, and that "[t]he above described activities are clearly illegal and in violation of the Appellant's constitutional rights, yet were ignored by the trial court."

Constitutional points merely raised but not developed will not be reviewed. *Dumas v. State*, 90 Wis.2d 518, 523, 280 N.W.2d 310, 313 (Ct. App. 1979). "Simply to label a claimed error as constitutional does not make it so, and we need not decide the validity of constitutional claims broadly stated but never specifically argued." *State v. Scherreiks*, 153 Wis.2d 510, 520, 451 N.W.2d 759, 763 (Ct. App. 1989) (citation omitted). Krist fails to cite authority for this

(..continued)

duly authorized committee of a city council decides not to issue a new license under this chapter, it shall notify the applicant for the new license of the decision not to issue the license. The notice shall be in writing and state the reasons for the decision.

claimed constitutional violation. *See* § 809.19(1)(e), STATS. Arguments unsupported by appropriate references to legal authority will not be considered. *State v. Shaffer*, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980).

Next, Krist challenges the legality and constitutionality of the mayor's and the City's activities. Krist contends that their obvious bias, demonstrated by name-calling, derogatory comments and city council minutes, denies Krist's constitutional rights. Krist argues that factual issues exist as to the mayor's credibility. We disagree. Krist does not dispute that the Citgo Quik Food Mart sells gasoline. Consequently, Krist is not entitled to a license under Ashland's ordinance. Because the ordinance prohibits the sale of alcohol at its convenience store, Krist fails to demonstrate any prejudice resulting from the alleged bias.

*By the Court.* – Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.